

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>AMERICAN FEDERATION OF</b>	)	
<b>STATE, COUNTY, AND MUNICIPAL</b>	)	
<b>EMPLOYEES, LOCAL 1102,</b>	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b><u>ULP No. 05-04-477</u></b>
	)	<b>Probable Cause Determination</b>
<b>CITY OF WILMINGTON,</b>	)	
<b>Respondent.</b>	)	

**BACKGROUND**

The City of Wilmington (“City”) is a “public employer” within the meaning of section 1302(p)<sup>1</sup> of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA” or “Act”).

The American Federation of State, County and Municipal Employees, Local 1102 (“AFSCME” or “Union”) is an “employee organization” within the meaning of section 1302(i) of the Act<sup>2</sup> and was the “exclusive bargaining representative” of a bargaining unit of certain employees of the City at all times relevant to this dispute within the meaning of 19 Del.C. §1302(j).<sup>3</sup>

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<sup>1</sup> 19 Del.C. §1302(p): “Public employer or employer” means the State, any county of the State or any agency thereof, and/or any municipal corporation, municipality, city or town located within the State or any agency thereof, which upon the affirmative legislative act of its common council or other governing body has elected to come within the former Chapter 13 of this title or which hereafter elects to come within this chapter, or which employs 100 or more full-time employees.

<sup>2</sup> 19 Del.C. §1302(i): “Employee organization” means any organization which admits to membership employees of a public employer and which has as a purpose the representation of such employees in collective bargaining, and includes any person acting as an officer, representative or agent of said organization.

On April 25, 2005, AFSCME filed this unfair labor practice charge alleging that the City violated §1307(a)(5) of the Act<sup>4</sup> by refusing to arbitrate two (2) grievances filed pursuant to the terms of the collective bargaining agreement. The complaint also alleges that the City has failed to provide the Union with information the Union requested by letter dated August 15, 2003. The information requested is a matter of public record under 29 Del.C. Chapter 100.

On May 6, 2005, the City filed its Answer, New Matter and Counter Complaint. In its Answer the City denies that it has a duty to arbitrate because the grieved incidents occurred after the expiration of the prior collective bargaining agreement and before the current collective bargaining agreement (which was not finalized until passed and signed by City Council and the Mayor on December 15, 2004.)

The City alleges that at the Step IV grievance hearing on November 17, 2004, the parties agreed there would be no further processing of this matter if one of the grievants was selected to fill the vacancy. A grievant was selected for promotion; Therefore, the grievances were resolved.

Under New Matter, the City maintains that because the Union through District Council 81 Representative Fran Lally and then Local 1102 President Dinah Russ agreed that the decision of the Step IV hearing officer would be final and binding, the Petitioner cannot now state a claim upon which relief can be granted as there is no issue to arbitrate.

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<sup>3</sup> 19 Del.C. §1302(j): “Exclusive bargaining representative” or “exclusive representative” means the employee organization which as a result of certification by the Board has the right and responsibility to be the collective bargaining agent for all employees in that bargaining unit.

<sup>4</sup> 19 Del.C. §1307(a)(5): (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following: (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate bargaining unit, except with respect to a discretionary subject.

The City maintains that a grievance filed by employee Ellen White was filed beyond the “180 day” statute of limitations. Further, employee White is not entitled to any relief since she was not denied a promotion in accordance with established policies and procedures and/or the existing collective bargaining agreement.

Count I of the City’s Counter Complaint essentially repeats that union representatives Lally and Rush agreed not to pursue the matter beyond step IV. The City contends that the failure of Lally and White to honor their commitment violated the covenant of good faith and fair dealing implied in all employment contracts which constitutes a violation of §1307(b)(2)<sup>5</sup> of the Act.

Count II alleges that at the time of the Step IV hearing the status quo of the previous collective bargaining agreement was in effect. By violating the covenant of good faith and fair dealing the Union violated the Doctrine of the Status Quo thereby violating §1307(b)(2), of the Act.

Count III alleges that the prior and current collective bargaining agreements each require the Union to “fully and fairly” represent all members of the bargaining unit. By representing the interests of Dinah Russ over those of Farrah Lambert the Union is breaching its duty of fair representation to all bargaining unit employees.

On May 31, 2005, the Union filed its Response to New Matter and Answer to the Counter Complaint. With regard to the New Matter the Union denies there was an agreement by the Union to accept the Step IV grievance decision. The Union denies each count of the Counter Complaint.

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<sup>5</sup> 19 Del.C. §1307(b)(2): It is an unfair labor practice for a public employee or for an employee organization or its designated representative to do any of the following: Refuse to bargain collectively in good faith with a public employer or its designated representative if the employee organization is an exclusive representative.

## **DISCUSSION**

The Union argues that the current contract was, by its terms, retroactive to July 1, 2001, and was, therefore, in effect at the time the underlying facts of the two (2) grievances in question occurred.

Not only does the City's duty to arbitrate under the specific circumstances present here raise a question of first impression before the PERB, the potential for its broad application of the City's position in derogation of contractually required arbitration requires the resolution of this issue.

When viewed in a light most favorable to the Charging Party, the pleadings establish probable cause to believe that an unfair labor practice may have occurred insofar as the City's duty to arbitrate.

As to the allegations raised in the Counter Complaint, Count I raises a factual issue which goes to the merits of the underlying substantive issue of the grievance rather than the question of the City's duty to arbitrate the grievances in question.

Count II of the Counter Complaint is a non issue. If, as the City alleges, the status quo of the prior collective bargaining agreement remained in effect as of the date of the Step IV grievance answer, the City was obligated to arbitrate the grievances pursuant to the grievance and arbitration language in the contract.

Count III of the Counter Complaint alleges only a contractual violation which is properly a subject for the contractual grievance procedure and arbitration. No statutory violation is alleged.

The allegation in the Complaint that the Union did not receive information requested in a letter dated August 15, 2004, is unclear. As is the City's allegation in its

Answer under New Matter that employee White's grievance was filed after the 180 day statute of limitations had expired.

Wherefore, a hearing will be convened for the purpose of receiving evidence and argument concerning the circumstances which precipitated the City's refusal to arbitrate the grievances in question.

### **PROBABLE CAUSE DETERMINATION**

1. Consistent with the foregoing discussion, the pleadings establish probable cause to believe that a violation of 19 Del.C. §1307(a)(5), as alleged in the Complaint may have occurred.
2. The pleadings fail to establish probable cause to believe that, as alleged in Count I and Count II and Count III of the Counter Complaint, a violation of 19 Del.C. §1307(b)(2) may have occurred.
3. A hearing will be scheduled for the purpose of establishing a factual record upon which a decision concerning the City's duty to arbitrate can be rendered.

**IT IS SO ORDERED**

/s/Charles D. Long, Jr.

**Charles D. Long, Jr.,  
Executive Director**

**Dated:** June 8, 2005